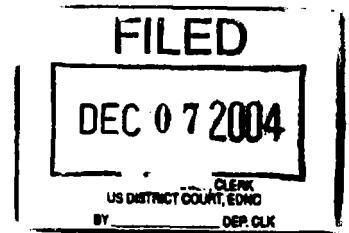


FILED WITH
COURT SECURITY OFFICER
12/7/04 *Kayhill*
DATE 1:32pm

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:04-CR-211-BO(1)



UNITED STATES OF AMERICA

v.

DAVID A. PASSARO

MOTION TO DISMISS INDICTMENT AS
UNCONSTITUTIONAL INFRINGEMENT
OF THE COMMANDER-IN-CHIEF'S
WAR-MAKING DUTIES AND POWERS,
AND CONTRARY TO THE
CONGRESSIONAL JOINT RESOLUTION
AUTHORIZING PREEMPTIVE USE OF
"NECESSARY AND APPROPRIATE
FORCE"

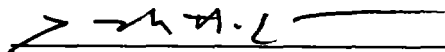
(Filed In Camera and Under Seal with the
Court Security Officer)

DAVID A. PASSARO, defendant in the above-captioned case, by and through counsel, hereby moves this Honorable Court to dismiss the indictment on grounds that application of the assault statute, 18 U.S.C. § 113, to the battlefield interrogation of a suspected terrorist in a war zone is an unconstitutional infringement of the exclusive duties of the Commander-in-Chief, as set forth by Art. II, § 2 of the United States Constitution. Alternatively, such application of 18 U.S.C. § 113 is contrary to Public Law 107-40, which authorized the Commander-in-Chief to "use all necessary and appropriate force" to "prevent any future acts of international terrorism against the United States," and to "protect United States Citizens both at home and abroad." A supporting memorandum of law accompanies this motion.

Unsealed 4/12/05

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Respectfully requested this 7th day of December, 2004.

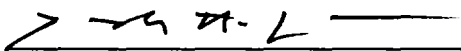
for 

THOMAS P. McNAMARA
Federal Public Defender
N.C. State Bar No. 5099

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to paragraph 20 of the Protective Order issued by the Court on July 29, 2004, a copy of the foregoing was submitted to Jennifer H. Campbell, one of the Court Security Officers identified in paragraph 4 of the Protective Order, by hand delivering a copy of same.

This the 7th day of December, 2004.

for 

THOMAS P. McNAMARA
Federal Public Defender
N.C. State Bar No. 5099